



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JRE
Docket No: 3204-99
28 January 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: FORMER [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected to show that he was retired by reason of physical disability.

2. The Board, consisting of Ms. LeBlanc and Hardbower and Mr. Kastner, reviewed Petitioner's allegations of error and injustice on 21 January 2000 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. Petitioner was evaluated by the Record Review Panel (RRP) of the Physical Evaluation Board (PEB) on 25 July 1996. The RRP made preliminary findings that he was unfit for duty because of lower back condition rated at 10% under Department of Veterans Affairs (VA) code 5295, as lumbosacral strain, and hearing loss, right ear, rated at 0%. The latter condition was related to multiple surgical procedures underwent during his enlistment. Petitioner rejected those findings and demanded a formal hearing. On 19 November 1996, a hearing panel of the PEB considered the case at a formal hearing. A majority of that panel determined that the back condition was ratable at 40% under VA code 5295, as a severe condition. The hearing loss was rated at 0%. A minority of the hearing panel determined that the back condition was ratable at 20%, and the hearing loss at 0%. On 16 May 1997,

the President, PEB, approved the findings of the minority of the hearing panel. Petitioner was discharged with entitlement to disability severance pay on 31 July 1997. On 1 July 1998, the VA rated the back condition at 20%, and assigned 10% ratings for gastroesophageal reflux disease and hypertension, and 0% ratings to four additional conditions.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board was not persuaded that Petitioner's lower back condition was ratable above 20% disabling at the time of his discharge from the Marine Corps. In addition, the Board was not persuaded that Petitioner's gastroesophageal reflux disease, mild hypertension, or any other condition were separately unfitting. In this regard, it noted that whereas the VA rates all conditions classified as "service connected", the military departments may rate only those conditions which render a service member unfit for duty. With regard to Petitioner's hearing loss, the Board noted that it is extremely rare for a service member with the degree of hearing loss experienced by Petitioner to be found unfit for duty, as there is minimal to no impairment associated that degree of loss. It appeared to the Board that he was actually found unfit for duty because of the multiple surgical procedures he underwent to correct conditions of his right ear, and an anticipated need for further surgery, rather than because of his minimal hearing loss. Accordingly, it concludes that it would have been more appropriate to rate his condition by analogy to new growths, benign, ear, which would have entitled him to a 10% rating

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

- a. That Petitioner's naval record be corrected to show that he was not discharged from the Navy on 31 July 1997.
- b. That Petitioner's naval record be further corrected to show that he was permanently retired by reason of physical disability effective 1 August 1997, with a combined rating of 30% for spondylolysis, facet degeneration, L5/6 and degenerative disc disease, L5/S1 herniated nucleus pulposus, rated at 20% under VA code 5295, and new growth, benign, right ear, rated at 10% under VA code 6299-6209, for a combined rating of 30%.
- c. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) it is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



JAMES R. EXNICIOS
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER
Executive Director